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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

LEO HOFFMAN CHEVROLET,

Plaintiff and Appellant,

v.

GRAYBAR FINANCIAL SERVICES,

Defendant and Respondent.

B204122

(Los Angeles County
Super. Ct. No. KC048453)

APPEAL from a judgment of the Superior Court of Los Angeles County, R. Bruce Minto, Judge. Affirmed.

Richard G. Anderson, Inc. and Richard A. Lepore for Plaintiff and Appellant.

TroyGould, Russ M. Fukano, Kenneth J. MacArthur and Eric L. Compere for Defendant and Respondent.

INTRODUCTION

Plaintiff Leo Hoffman Chevrolet appeals from a judgment in favor of defendant Graybar Financial Services (Graybar) following the trial court's denial of plaintiff's motion for leave to file a proposed third amended complaint and award of attorney's fees to Graybar.¹ We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff filed its complaint for damages on May 19, 2006, against Pro-Active Surveillance, Inc. (Pro-Active) and Graybar. Pro-Active is a vendor of security equipment and Graybar is a leasing company.² Plaintiff is an auto dealership with two locations.

The complaint alleged a breach of contract against Graybar. On August 9, 2006, Graybar's demurrer was sustained with leave to amend. Plaintiff filed a first amended complaint on September 1, 2006. On January 5, 2007, the trial court sustained Graybar's demurrer to the first amended complaint with leave to amend.

On February 5, 2007, plaintiff filed a second amended complaint, alleging causes of action for breach of contract, fraud and rescission. On April 10, 2007, the trial court sustained Graybar's demurrer as to the breach of contract cause of action without leave to amend. The demurrer was sustained without leave to amend as to the causes of action for fraud and rescission, but this was without prejudice to filing a motion for leave to file an amended complaint as to the fraud and rescission causes of action.

¹ Plaintiff also purports to appeal from the order denying its motion for leave to amend and the order awarding attorney's fees. These orders are not appealable but may be reviewed on appeal from the final judgment. (Code Civ. Proc., § 904.1, subd. (a); *Reichert v. General Ins. Co.* (1968) 68 Cal.2d 822, 825, fn. 1.)

² Pro-Active is not a party to this appeal. We therefore do not address the proceedings as to Pro-Active.

Plaintiff filed a motion for leave to file a third amended complaint. On June 13, 2007, the trial court denied plaintiff's motion and set forth four findings in support of its decision: First, the trial court, while indicating that the standard for motions to amend is "pretty liberal," found that there had been no showing regarding diligence or when and how plaintiff discovered the alleged new facts, since the case had been pending 13 months.

Second, the trial court found that allowing the amendment and bringing Graybar back into the case would be prejudicial and rejected plaintiff's incorrect assertion that there was no trial date pending. The trial court indicated that a trial date was set for August 6, with mediation to be completed in July 2007.

Third, the trial court found that the third amended complaint was a "step backward" and an attempt to start the case over again. The trial court also noted that "you [couldn't determine] which causes of action were against which defendants."

Fourth, the trial court found that the alleged new facts were not discovered through formal discovery but through something that plaintiff had told its counsel on an unspecified date, and plaintiff failed to explain the delay in making the discovery:

"The Court: So you're now saying that the information that you're basing the fraud claim on was not obtained in discovery. It was just related to you by your client?"

"Mr. Lepore: Correct.

"The Court: And, one, that's not covered in any of the declarations and, two, there's nothing to show me as to why it wasn't discovered in the last 13 months that this complaint's been pending. And we've had to deal with demurrer to the original complaint, demurrer to the second amended complaint."

The trial court did not reach the issue of whether the proposed third amended complaint stated causes of action for fraud and rescission against Graybar. The trial court ruled as follows: "Okay. I'm not making the ruling based on whether or not the complaint states a cause of action or not because if Graybar is brought back in they'd have opportunities to demurrer to this complaint. But I'm making the ruling on the grounds as previously expressed from the tentative and the other discussions since the

tentative. There's just no showing of reasonable diligence as to when these facts were discovered and if they were discovered recently why they weren't discovered earlier."

Graybar filed and the trial court granted a motion for attorney's fees and costs incurred. Judgment was entered in favor of Graybar on February 26, 2008.

DISCUSSION

Denial of Leave to Amend

Plaintiff contends that the trial court abused its discretion in denying leave to amend its complaint and precluding it from proceeding against Graybar on the fraud and rescission causes of action. We disagree.

Code of Civil Procedure section 473, subdivision (a)(1), provides the trial court may, "in its discretion, after notice to the adverse party, allow, upon any terms as may be just, an amendment to any pleading" "It is a basic rule of pleading in this state that amendments shall be liberally allowed so that all issues material to the just and complete disposition of a cause may be expeditiously litigated, but 'the question whether the filing of an amended pleading should be allowed at the time of trial is ordinarily committed to the sound discretion of the trial court.'" (*Vogel v. Thrifty Drug Co.* (1954) 43 Cal.2d 184, 188.)

If necessary to the furtherance of justice, the trial court may grant a motion to amend as late as the time of trial, and if necessary postpone the trial. (*Honig v. Financial Corp. of America* (1992) 6 Cal.App.4th 960, 965.) In deciding whether to grant the motion, the trial court must consider a number of factors. These include whether the defendant has been made aware of the charges contained in the factual allegations of the amended complaint and will not be prejudiced by the proposed amendment. (*Ibid.*) They also include the conduct of the plaintiff and whether there is justification for any delay in the presentation of the proposed amendment. (*Leader v. Health Industries of America, Inc.* (2001) 89 Cal.App.4th 603, 613.) "The law is well settled that a long deferred presentation of the proposed amendment without a showing of excuse for the delay is

itself a significant factor to uphold the trial court's denial of the amendment. [Citation.]' [Citation.] 'The law is also clear that even if a good amendment is proposed in proper form, unwarranted delay in presenting it may—of itself—be a valid reason for denial.' [Citation.]" (*Ibid.*; accord, *Vogel v. Thrifty Drug Co.*, *supra*, 43 Cal.2d at p. 189.)

In reviewing the trial court's denial of a motion for leave to amend, we must bear in mind both the policy of liberally allowing amendment of pleadings and the policy of upholding the trial court's exercise of its discretion in the absence of a clear abuse. (*Honig v. Financial Corp. of America*, *supra*, 6 Cal.App.4th at p. 965.) ""More importantly, the discretion to be exercised is that of the trial court, not that of the reviewing court. Thus, even if the reviewing court might have ruled otherwise in the first instance, the trial court's order will yet not be reversed unless, as a matter of law, it is not supported by the record."" [Citations.]" (*Branick v. Downey Savings & Loan Assn.* (2006) 39 Cal.4th 235, 242, italics omitted.)

Discretion is abused if the trial court's action ""is arbitrary, capricious or entirely lacking in evidentiary support,"" or if it ""transgresses the confines of the applicable principles of law."" (*Ohton v. Board of Trustees of California State University* (2007) 148 Cal.App.4th 749, 766.)

While the general policy is liberality in allowing amendments, it is proper and within the discretion of the trial court to deny leave to file a proposed amendment unless the proponent of the amendment is able to show that the amendment will not be prejudicial to other parties in the action and the delay in bringing the amendment was excusable. (*Melican v. Regents of University of California* (2007) 151 Cal.App.4th 168, 175.)

Here, the proposed amended complaint was offered 13 months after the commencement of the litigation. The trial court denied plaintiff's request to amend on four grounds, including that there was no showing of diligence in making the amendment, and the amendment bringing Graybar back in to the case two months prior to trial would have been prejudicial.

In plaintiff's motion to amend, there is conclusory language that plaintiff learned through its investigation that Graybar was guilty of fraud based upon the recent discovery of plaintiff. There was no showing at all regarding diligence, when the facts were learned and how they were learned. During oral argument on the motion, counsel for plaintiff indicated that the information for the fraud claim was not obtained in discovery but was just related to him by his client. The trial court correctly pointed out that there was nothing to show why it wasn't discovered in the 13 months that the case had been pending.

Plaintiff contends that the proposed amendment stated a cause of action. While a trial court may deny a proposed amendment on the grounds that it fails to state a cause of action, it is still proper for a trial court to deny an amendment if there is an unexplained delay in moving to amend, even though the proposed complaint states a cause of action. (*Huff v. Wilkins* (2006) 138 Cal.App.4th 732, 746.) Whether the proposed third amended complaint stated a cause of action against Graybar thus is not relevant. As indicated above, the trial court's ruling was not based upon whether the proposed third amended complaint stated a cause of action. Plaintiff simply failed to show a satisfactory reason for the delay in filing its motion. The vague reference of counsel for plaintiff during oral argument that the information to justify the third amended complaint against Graybar was obtained by his client recently in talking with other people was clearly not enough to show due diligence as required by law.

Award of Attorney's Fees

Plaintiff does not attack the amount of attorney's fees awarded to Graybar. Plaintiff's argument is that the trial court erred in denying leave to amend, and the fee award should be set aside because of this error. Since we find no error in the denial of leave to amend, the award of attorney's fees was proper.

DISPOSITION

The judgment is affirmed. Graybar is to recover its costs on appeal.

JACKSON, J.

We concur:

PERLUSS, P. J.

ZELON, J.